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THE

TRIAL

OF

CYRUS B. DEAN,

FOR THE MURDER OF

JONATHAN ORMSBY AND ASA MARSH,

BEFORE THE SUPREME COURT OF JUDICATURE OF THE STATE OF VERMONT, AT THEIR SPECIAL SESSIONS, BEGUN AND HOLDEN AT

BURLINGTON, CHITTENDEN COUNTY,

ON THE 23d OF AUGUST, A. D. 1808.

REVISED AND CORRECTED FROM THE MINUTES OF THE JUDGES.

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TRIAL, &c.

STATE OF VERMONT.

CHITTENDEN SS.

SUPREME COURT OF JUDICATURE.

SPECIAL Sessions begun and holden at Burlington, on the 23d day of August, A. D. 1808, by order of the Chief Justice, with advice of the associate Judges....present,

The Honorable ROYALL TYLER, Esq. Chief Judge,
The Honorable THEOPHELUS HERRINGTON,
and JONAS GALUSHA, Esq'rs, Assist. Judges.

On Friday the 26th of August, the Grand Jury presented the following bill of Indictment.

STATE OF VERMONT,

CHITTENDEN COUNTY.

Be it remembered that at a Special Session of the Honorable Supreme Court of Judicature, begun and holden at the Court house in Burlington, within and for the County of Chittenden, on Tuesday the twenty third day of August, in the year of our Lord one thousand eight hundred and eight,

THE Grand Jurors within and for the body of the County of Chittenden, now here sworn, upon their oath present, That *Samuel I. Mott*, late of Alburgh, in the County of Franklin, *William Noaks*, late of Highgate, in the same County, *Slocum Clark*, late of the same Highgate, *Truman Mudget*, late of the same Highgate, *Cyrus B. Dean*, late of Swanton, in the same Franklin County, *Josiah Peas* late of the same Swanton, *David Sheffield*, late of Colchester, in the County of Chittenden, and *Francis Ledgard*, late of Milton in said Chittenden County, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the third day of August, in the year of our Lord one thousand eight hundred and eight, with force and arms at Burlington aforesaid, in the County of Chittenden aforesaid, in and upon Jona-

than Ormsby and Asa Marsh, in the peace of God and this State, then and there being, feloniously, wilfully, and of their malice prepense, did make an assault, and that the said Samuel I. Mott, a certain gun called a Wall piece, then and there, loaded and charged with gun powder and fifteen leaden bullets, which said gun he the said Samuel I. Mott, in both his hands, then and there, had and held to, against, and upon the said Jonathan Ormsby and Asa Marsh, then and there, feloniously, wilfully, and of his malice prepense, did shoot and discharge, and that the said Samuel I. Mott, with the leaden bullets aforesaid, out of the gun aforesaid, then and there, by force of the gun powder shot and sent forth as aforesaid, the aforesaid Jonathan Ormsby and the aforesaid Asa Marsh, in and upon the left breast of him the said Jonathan Ormsby, a little above the pit of the stomach of him the said Jonathan Ormsby, and in and upon the right breast of him the said Asa Marsh, near the centre of the right breast of him the said Asa Marsh, then and there, with the leaden bullets aforesaid, out of the gun aforesaid, by the said Samuel I. Mott so as aforesaid, shot, discharged and sent forth, feloniously, wilfully, and of his malice prepense, did strike, penetrate, and wound, giving to the said Jonathan Ormsby, then and there, with the leaden bullets aforesaid, so as aforesaid shot, discharged, and sent forth out of the gun aforesaid, by the said Samuel I. Mott, in and upon the left breast of him the said Jonathan Ormsby, a little above the pit of the stomach of him the said Jonathan Ormsby, one mortal wound, of the depth of four inches, and of the breadth of one inch, and in and upon the right breast of him the said Asa Marsh, near the center of the right breast of him the said Asa Marsh, one mortal wound, of the depth of four inches, and of the breadth of one inch, of which said mortal wounds, the aforesaid Jonathan Ormsby and the aforesaid Asa Marsh, then and there, instantly died; and that the aforesaid William Noaks, Slocum

Clark, Truman Mudget, Cyrus B. Dean, Josiah Peas, David Sheffield and Francis Ledgard, then and there, feloniously, wilfully, and of their malice prepense, were present, aiding, helping, abetting, comforting, assisting and maintaining the said Samuel I. Mott, the felony and murder aforesaid, in manner and form aforesaid, to do and commit; and so the Jurors aforesaid, upon their oath aforesaid, do say, That the said Samuel I. Mott, William Noaks, Slocum Clark, Truman Mudget, Cyrus B. Dean, Josiah Peas, David Sheffield and Francis Ledgard, then and there, in manner and form aforesaid, feloniously, wilfully, and of their malice prepense, the said Jonathan Ormsby and the said Asa Marsh, did kill and murder, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Saturday, 27th of August.

Court. Mr. Sheriff, set *Cyrus B. Dean* to the bar of the Court.

The Prisoner appeared.

Clerk. CyrusB. Dean, harken to an Indictment found against you by the Grand Jury of the County of Chittenden. [*The Clerk here read the Indictment.*]

Clerk. Cyrus B. Dean, how say you, are you guilty of the charges in this Indictment, or not guilty?

Prisoner. Not guilty.

Clerk. By whom will you be tried?

Prisoner. By my country.

On the same day Samuel I. Mott, Truman Mudget, Josiah Pease and Francis Ledgard were arraigned on the same indictment and severally plead not guilty, and demanded separate trials.

Court. Mr. Attorney, in what order do you propose to bring the accused forward for trial.

States Attorney, Wm. Chace Harrington, Esq. I propose to commence the prosecution on the part of the State, with the trial of Samuel I. Mott, and to call Cyrus B. Dean to the bar next.

On Monday, August, 29th, the trial of Samuel I.

Mott commenced, and occupied the Court until Thursday evening, 11 o'clock, when the Jury returned their Verdict into Court.

On Friday, September the 2nd, Cyrus B. Dean was put to the bar for trial, but the challenges, peremptory and for favor, were so numerous, that after an ineffectual attempt to fill the pannel, the Court ordered a new venire for petit Jurors, and adjourned to Saturday morning.

Saturday, September 3d.

The whole bench present and the prisoner put to the Bar.

Court. Cyrus B. Dean, The Court are now prepared to proceed upon your trial; are you ready?

Prisoner. Yes.

The Crier made proclamation, and the petit Jurors were called and answered.

Court....to the prisoner. By the statute upon which you are indicted, you are allowed to challenge six of the pannel peremptorally, that is, without assigning any reasons; if you wish to challenge more, it must be for cause, which your counsel will state to the Court.

After one challenge for favor, the following gentlemen were impannelled and sworn.

JURY.

John Brown, Williston, *Foreman.* Parker Tallcott, Ditto. Zacheriah Hart, Ditto. Joy Bradley, Essex. Elisha Emmons, Jun. Ditto. Jasper Griffith, Jerico, Samuel French, Ditto. Jesse Gloyd, Do. Benoni Thompson, Richmond. Arnold Stephens, do. Jas. Stephens, Jr. Ditto. Asa Moon, Hinesburgh, *Talisman.*

Counsel for the State.

The State's Attorney, David Fay, Esq. District Attorney, and Cornelius P. Vanness, Esq. assigned by the Court on application of the State's Attorney.

Counsel for the prisoner.

Amos Marsh and Bates Turner, Esq'rs.

The State's Attorney opened the cause on the part of the State, by stating the Law and the facts which he

expected would appear in evidence, and called the following witnesses.

Evidence on the part of the State.

JOSIAH EDSON---sworn. On the last day of July last, I was on board the boat called the Black Snake, when she was passing the Lake from the Province of Canada into this State, Truman Mudget, Samuel I. Mott, Day, Slocum Clark, Capt. Pease and the Prisoner, Dean, were on board ; each man had a gun by him, Mudget who was captain, had two, and there was one gun without a lock. I understood by them they were coming to Onion river, and some other place near Burlington, after Potash, to run into Canada. To my certain knowledge, this was the fourth time this boat had gone to Canada with Potash, and they always went well armed, but not so strongly as lately. I have heard of their going before, but I do not know it of my own knowledge. At this time they had a number of clubs, about three feet in length, several spike poles and a basket of stones, each about as big as a man's fist, on board. The poles I understood were to keep off the revenue boats and the stones to defend themselves with. [*These weapons were present in Court.*]

Court. Are these weapons, the same you saw on board ?

Witness. I believe them to be the same. The captain's orders were not to fire until they were fired upon, to endeavour to escape, and if they could not, to fire as strait as they could, and endeavour to do as much execution as possible ; they were to use their clubs and stones first ; I understood from the men that they had from eight to ten dollars a trip and the captain paid them, and he had five or six dollars per barrel for running the Potash ; I parted with them at Hogg Island, about four miles from where they started ; they had not the big gun then with them ; they all said it was their determination to fight their way back into Canada ; they were not

well on it for ammunition and had but ten bullets among them

Stephen Pearl Lathrop, sworn. I live with col. Stephen Pearl, (in Burlington village) who owns an intervale farm on the South side of Onion river; one Magery Joy is the colonel's tenant. About nine of the clock, Tuesday morning, the 2d of August, I was at Joy's house, which is a few rods from the bank of the river, and there came there seven men of the crew of the Black Snake, said to be a smuggling boat; they went to cooking fish; I went to the field to work with James M'Kenzie and George Sheffield; about 11 o'clock we heard firing of several guns, one report was much louder than the others; I sent M'Kenzie to turn some barley near the house, he returned and said there were men there with guns; I observed, the government troops have come; we pulled flax until sunset, when I went to the barn and saw two men a sleep on the floor, I then went to Joy's house, saw Mott, Mudget, Perkins and the Prisoner there; I saw one or two guns in the house, and the large gun resting on the outside of the house; I returned to col. Pearl's and lodged, and the next morning went again to the intervale, when George Sheffield told me the revenue boat was coming up the river; I soon after joined the smugglers, who were sitting drinking under some butternut trees on the bank of the river below Joy's house; the prisoner, Perkins, captain Pease, Slocum Clark and William Nokes were present; the two latter I did not know at that time, but have learned their names since; they had seven muskets leaning against the trees; they invited me to drink and told me they had heard of the revenue boat's coming up, but they were prepared to meet them, they said Mott and David Sheffield were gone down the river to see if the boat was really coming, and that David Sheffield said he could bring a gun as well as not; they all said if the revenue boat came up, they should sup sorrow; they had bullets in their pockets, they took them out in their hands and

called them blue pills ; they then said we had better bring the great gun down, and the prisoner went and brought it from the barn ; soon after, David Sheffield appeared on the north side of the river, his brother George brought him over the river ; he was immediately asked what news ? he replied " bad enough, there is a boat coming with thirty men, twenty six of them rowing ;" Day asked if the boat had not a red rim ; he said yes ; Day then said, it is a damned lie, I know the boat well, I think there can but ten men row ; David Sheffield brought a gun with him and two powder horns, one empty, the other had powder in it ; he soon after loaded his gun and one of the party said to him, " Though you are small, you can take good sight ; he replied, by God I can take as good sight as any of you, and offered to bet with any of them at shooting at a mark ; some one of the company then observed that the large gun would do better execution if charged with round bullets ; they then drew the charge which was a handful of slugs or bullets beat square ; I saw them put the bullets into the gun and as one droped the last he said " this makes 15 ;" soon after, Mott came opposite to us on the north side of the river, he was brought over in a batteau and two men with him, when he was coming over they said, here comes Mott and now we shall know about it ; Mott joined the party and told them that he had seen the boat, that there were fourteen men in it and one had regimentals on ; Day here turned to David Sheffield and said, did I not tell you, you told a damned lie ? Mott said, they are coming and we must prepare for them, and advised to taking the sails and oars out of the batteau, which lay at Joy's landing and belonged to one Hall, whilst he and Mudget would do the same to the snake, which lay 60 rods above; Day proposed to go to the revenue cutter & tell them the snake was not in the river, and that if they came up they would soon see their God, as there were 30 armed men above ; after Mott and Mudget returned from the black snake, Mudget and

Day went towards the revenue boat without arms and soon returned; at first they talked of placing the large gun near Hall's batteau, but Mott observed it was foolish to guard Hall's boat and some one said, "it is no small matter to kill men and have to flee our country; we did not come up in Hall's boat and it is foolish to fight for it;" about this time some of the party were very noisy, Mudget requested them to be silent, he said they would be overheard by the revenue boat's crew, and the man who talked the loudest would be the first to cow out; they all then, except Day, who was left in Hall's batteau, went with the large gun and their other arms towards the black snake; the prisoner, Dean, carried the large gun and Mott the ram rod; the revenue boat was then about 60 rods below Joy's, it soon came up to the batteau; the lieutenant asked who owned her? Day said I have the care of her and while I have, I own her; the lieutenant said I have orders to take all boats I suspect to be concerned in smuggling; the lieutenant then asked Day where the black snake lay, he told him she had gone out of the river the night before deeply loaden, and said, did you not meet her? she was within eight feet of you, the lieut. then went to Joy's house, and when he returned, Day said, you had better take the batteau, he replied, I will go further up the river and call and look at her on my return, and then ordered his men to row up the river.

Court. Describe the land near the scene of action.

Witness. The whole scene of action lay near and upon Onion River, there is a road leading from Burlington village, to Onion river, which runs northwardly through col. Pearl's farm, when it comes to the river; Joy's house is on the west side of this road, on the east side are cleared fields; as you go up the river to where the black snake lay, there is next to the river, a strip of land from 6 to 10 rods in width, covered with trees and underwood, which

compleatly conceals the river from a person's view who is in the fields, to go down the river from Joy's house, you pass through a gate between the house and the river, you enter a beaten road which runs parrallel with the river beyond the scene of action; on the south side of this road are cleared fields fenced out, on the north side of the road there is no fence, but there is a strip of land forming the margin of the river, covered with trees and underbrush, the trees are not so thick as that you may not see a man sometimes 8 or 10 rods or more, the underbrush is about knee high, this strip is from two to six rods in width, thro' this strip there runs a natural trench, through which the water passes when the river is high, this trench is from 3 to 5 feet deep and so broad as to conceal a man from persons in boats on the river; in this strip of woods there are some openings to the river, the first of these is the landing place called the old landing place, just below Joy's house, some rods below are the butternut trees and from 60 to 80 rods further down the river is the place where the principal firing was; Onion river is there from 8 to 10 rods wide.

Court. How far above Joy's house did the black snake lay?

Witness. I never knew exactly, but by information I believe it to be about 60 rods.

Court. Proceed in your testimony.

Witness. We then went towards where the black snake lay, & soon saw the Snake's crew or smugglers retreating, Mott and the prisoner Dean, were forward, Dean had the great gun and Mott a small arm; we turned and went down the river, they halted at the butternut trees; Dean said, "we will not go with them, they are damned cowards;" Mott said, "I will go home, I will have nothing more to do with them;" Mott and the prisoner then conversed together aside, so that I could not hear the whole conversation, but I heard the prisoner say, "if you have a mind to be crooked, I can be as crooked as you;"

Mott then took up the great gun and proceeded down the river ; the prisoner staid a while with us, and observed that his brother in law, who I afterwards understood was Mudget, was a damned coward, he wished he was burnt to death, he wished he was scorched with wet powder so not quite to kill him ; about this time the revenue boat and black snake came in sight, rowing down the river ; the other smugglers with Mudget came on, Mudget said come on boys, they shall never go out of the river alive ; all the crew that went up to the black snake had now passed down with their arms, except capt. Pease ; I heard Ledgard and others threaten the soldiers on board the boats and say you never shall go out of the river alive ; I heard the lieutenant say I have taken the boat according to my orders and if you intend to fire, here I set as a mark ; when the smugglers came down with Mudget, there were some of the revenue boat's crew armed walking peaceably with them ; I understood the lieutenant landed four men where he took the snake, and took them in again just below Joy's landing, but I did not see but two of them ; M'Kenzie, Root, George Sheffield and Capt. Ormsby I think were with me ; I observed to M'Kinzie, let us go back to our work, for they dare not shoot, and we turned back and soon heard a gun fired, when I observed they have only fired in the air to scare them ; we then heard two or three guns and we turned and ran down the river, and while we were running, we heard a number of guns fired ; when I came near to where I heard the firing, I saw David Sheffield coming out of the brush, I said, " In God's name David, what have you been doing ?" he replied, " I have not killed a man, I have not fired ;" I said where is your gun ? he said, " I have thrown my gun away that they should not say I fired ;" I said David is your gun loaded ? he said no ; I then said, you know I saw you load it ; he replied, you don't want to hurt me, Pearl, do you ? I then ran fur-

ther down the river, through the brush, saw the black snake and revenue boat in the river, the black snake was furthest down stream, the revenue boat had but one man in her as I could discover and he was rowing with one oar, I did however but just get sight of her ; I steped into the road after I had ran some rods further and saw Mott with the large gun on his shoulder ; I saw the prisoner Dean and heard him hollow, " fire, why dont you fire ? they will all be upon us, they are coming up the bank ;" Mott then put the large gun across the corner of the fence and fired ; Dean was standing then in the edge of the trench, and I was about three rods behind Mott. I immediately whipped over the fence, and ran across the cornfield ; I never saw Mott afterwards, until in prison ; the next I saw was the Lieutenant passing up the road, with a handkerchief round his head, and another round his arm, all bloody ; the Lieutenant said, they have wounded me, I do not know but mortally, but I do not mind that, but they have killed two of my men and one of your neighbors, and I am sorry for what is to follow.

David B. Johnson, sworn. I was sergeant under Lieutenant Farrington. On Monday the 1st of August, 1808, Dr. Penniman, the collector, called upon the Lieutenant to go on an expedition after the black snake, a boat which we had frequently heard of as being concerned in smuggling ; the Lieutenant soon after handed me a paper with the names of twelve men whom he ordered me to detach, and we all went that night with the Lieutenant in the revenue boat called the Fly, to Mesisque bay, on the west side of Hogg island, near the south end of it ; we lay there that night, on Tuesday morning we came to a small bay, about a mile and an half from Webb's, on the east side of North Hero, where we got some intelligence of the black snake ; about 12 o'clock, opposite the Middle Hero, a man waved his handkerchief, we came to and the man told us that the black snake had gone into Onion river, he

gave us the names of those on board, he mentioned eight men and the prisoner was one, he told us he would meet us again at the sand bar, we rowed to thd sand bar and remained there all night, expecting the black snake would come on, we met the man again at the sand bar, and were confirmed in the intelligence that the black snake had gone into Onion river; Wednesday morning we got to Colchester point on the north side ; we landed and breakfasted ; the Lieut. & men went in the boat round the point, & I crossed it to gain information ; I soon met a man, from whose conversation I learned that he took me for a smuggler ; he asked me where I was going, I told him to the boat, he asked if we were after a load, I said I did not know whether we could get a load as I understood there were boats up the river, he said there were 2, I asked if the snake was one, he said yes, I enquired if she had gone out, he said no, if she had he should have known it, he said there would be no difficulty in our getting a load in the river, but that the black snake's crew had obtained intelligence that the revenue boat was coming after them, by a gentleman from Georgia, who went to them in a skiff early that morning, he enquired where our boat lay and whether we had seen the revenue boat, I made him some evasive answer, & went to meet the fly, which I found about half a mile up the river, we rowed up the river & soon saw a canoe with a boy or small man in it, as we came from under some willows in sight of the canoe the boy turned & paddled up the river, & we lost sight of it by his going round a point, I said it is a spy, we rowed after him ; an Indian hollowed from the shore we lifted our oars from the water, & the Indian said, "canoe come down, see you, turn back ;" we then pulled away hard, and on turning the point found we had gained on the canoe, the boy made for the north shore, took a gun and powder horn from the boat & ran up the river ; this boy I found afterwards to be David Sheffield by his dress ; we soon after landed at old Sheffield's, tarried an hour and then proceeded

up the river in the fly, and were confirmed that the black snake was up the river ; about a mile and an half below Pearl's farm, we saw two men coming down the river's bank on the south side, one was Day, I did not know the other, he asked if Dr. Wood was on board? we asked what he wanted of Dr. Wood? he said he had some especial business with him ; I said, Day, is it you ? Day said, what, you are going up the river after the black snake, are you ? I told him we were ; he said "we should not find her, that if we went up the river we should find something more terrible than the black snake, for there were thirty men armed ; I said, "Boys row on ;" Day ran and the man ran before him up the river ; We saw no more of Day until we come to Joy's landing, where we saw Day in Hall's batteau ; Day said are you going to take this boat ? the Lieutenant said if it is a smuggling boat, I shall ; I have orders to take all suspected boats, and if this is one, I will take it ; the Lieutenant and I stepped into the batteau, I asked Day where the black snake was ? he replied, "she had gone out of the river the night before, and went over the sand bar last night, did you not see her ? I warrant you went within eight rods of her ;" I said I did not believe she was gone, as he was one of her crew and would have gone in her ; he denied this, and said "if I did own the property, I would fight until every man was killed before I gave it up ;" Day then went away, I landed and went down the river to see if they had not drawn the black snake on shore, I soon found a track which I imagined might be it, but it proved to be the track of a stone boat ; when I returned I found the Lieutenant conversing with a man who at first appeared shy of me and would not tell his name, but when he was informed that I was under the Lieutenant, he said his name was Rice, and he informed the Lieutenant where the black snake lay ; we then rowed the Fly up the river about 50 or 60 rods and turning a small bend of the beach, came to where the black

snake lay, one end of her was on shore and fastended to some bushes, Mudget was standing on the beach, a few feet from her, with a gun on his shoulder, he called to us not to land, I told him we were in a free country and had a right to land where we pleased ; I had hold of the helm, and ran the Fly immediately along side, between the black snake and the shore ; as we ran in, Mudget retreated, but kept threatening and said " do not lay hands on the boat, I swear by God, I will blow the first man's brains out who lays hands on her ; the Lieutenant said, " I have orders to take her, she is forfeited and I shall take her ;" as we stepped into the black snake, Mudget stepped round some small trees, and as I looked up I saw Mott with the large gun resting in the crotch of a small tree pointing over the black snake where the Lieutenant and I were, Mudget came to the left side of Mott and they talked. The Lieutenant asked them where the sails, oars and rudder were ? They said they did not know---the Lieutenant said " Boys go and see if you cannot find them." Some of our men went to search, they could not find the oars but found the sails and brought them on board, as we were getting the sails on board, Mudget came to the bank and cried " come on boys, parade yourselves, you are all cowards, they are going to carry the boat off ;" I then saw two or three men with guns come from the weeds, the Prisoner Dean was one of them. The Lieutenant directed me to take four oars from the Fly and put them on board the black snake, which I did ; some one of our men then cut or unfastened the painter, Mudget then cried out again, " come on boys, are you cowards ? they are going to take the boat off ;" and I saw two more armed men come from the weeds ; I went with six men on board the black snake, the lieut. with 2 men remained on board the fly ; he landed four men, who walked on the shore out of our sight to below joy's landing ; we pushed the boats off, at this time Ledgard came to the bank and called in a methodist's tone of voice, " Lieutenant,

prepare to meet your God, your blood shall be spilt before you get out of the river," and more to the same purpose; when we came against Joy's landing, we could see our four men walking with four or five of the smugglers who then threatened the Lieutenant and said he should not go out of the river alive; one of them said, "that man with the red facings is a good mark to shoot at, and I will have his heart's blood;" the Lieutenant told them "if they wished to fire, he was a good mark;" when we came to the beginning of the strip of woods where the trench runs, the Lieutenant asked the men on shore if they had not rather ride than walk, they said they had and he ordered the fly on shore to receive them; Mr. Rice then came up and requested to be carried over the river, and he and the four men got into the fly, we had then seven men in each boat, besides Rice; we proceeded across the river to land Rice; before we landed, there was one gun fired, the ball struck between the boats; just as the boat struck the shore, there was another gun fired, the ball struck the fly in the stern, went through and passed about six inches from the Lieutenant's legs, as I found from after examination, knowing where he sat steering; there were then several guns fired at the black snake, the balls struck the water near her; the Lieutenant ordered Ellis Drake to take the helm; as he was stepping aft to do it, I took my eyes off, another gun was fired and I heard the Lieutenant say "they have killed Drake;" I saw Drake sinking down and his hat fall overboard; I have sworn at the Court of Inquiry that it appeared to me the Lieutenant at this time struck his colours; I am now convinced I was mistaken, and what led me into the mistake was, that the colours were just behind Drake and came down when he fell, and the Lieutenant stood over him examining his wounds; at this time the bow of the fly was down the river; when I saw Drake was killed, I took up my gun and was about to fire, the Lieutenant said "do not fire, row to the

south shore ;" I landed with the snake on the south shore, about fifteen rods below where Drake was killed ; the current though not strong set us down and we went a few rods further, where we saw a good place to get up the bank ; I was proceeding to go up into the road, but the Lieutenant forbid me, he was rowing the fly with one oar, sometimes on one side, sometimes on the other, his men had all lain down in the bottom of the boat ; there were several guns fired while we were crossing ; the Lieutenant soon after landed, and while he was landing, Capt. Ormsby came to the bank and said " why do you not land and seize these men who are violating the laws of their country ?" We then all went up the bank and walked a few paces in the road up the river ; I soon saw the smoak and heard the large gun fired, I was on the right of the Lieutenant, I saw a man run in the road up the river from where the large gun was fired, I drew up my gun to fire at him, but the Lieutenant said " don't fire, take hold of my hand, I am wounded ;" I laid my gun down and took the Lieutenant's gun, he was wounded through the left arm and a ball went through his hat and wounded him in the forehead ; I saw the blood run down his face, I turned my eyes and saw Asa Marsh on the ground bleeding, and some one said, they have killed Marsh, he lay six or eight feet from me, soon after I saw Capt Ormsby lying dead ; I heard no other gun fired but the large gun after I came on shore ; I was then sent after a Physician, I returned with Dr. Cole ; when we came to Joy's we found the Lieutenant there, I then went where the dead bodies were and saw David Sheffield and the Prisoner there, I said here are some of the smugglers and ordered my men to apprehend them, some of the inhabitants said, we must take care of the dead men, others said is there a magistrate here ? I said I have power to apprehend them and I wish all of you to assist me ; I then left them and went to Joy's house, and on my return found they had apprehended Day,

Sheffield and Dean, the prisoner ; soon after, I saw David Russell, Esq. who told me he was a magistrate and that the civil power would take care of them but wished I would assist in guarding the prisoners, and said they must be collected into a room and kept until warrants could be made out and a Court of Inquest sit ; soon after the State's Attorney came and the prisoners were taken away.

Cross examined by the Prisoner's Counsel. Was you not to have a reward for taking the black snake ?

Witness. I never understood there was any bounty offered for taking the black snake, I had heard that the law gave something, some said a half, some said a quarter, but I never expected any reward for doing my duty, except what was given by law, and I was uncertain about that.

James Hays, sworn. I was a soldier under Lieutenant Farrington, I confirm sergeant Johnson's testimony until we came to the black snake ; Mudget stood by her on the bank, and told us not to land at the peril of our lives, the Lieutenant said he had orders to take the boat and some one of our company said this is a free country and we have a right to land where we please ; the Lieutenant aud sergeant went on board the black snake and I went also, Mudget made a motion with his gun as if he intended to fire at us, and again bid us stand off at our peril, for he would blow the first man's brains out who put his hands on the boat ; the Lieutenant ordered us to go on shore and look after the oars and sails, we could not find the oars but we found one sail & carried it on board ; while we were hunting for the oars I heard Mudget say to the Lieutenant, " we are both men of honor, you are a Lieutenant, I am a Major, let us fight a duel and save the lives of our men, and then added, I will lay your honor low and have your heart's blood before you get out of the river ;" the Lieutenant ordered sergeant Johnson to take six oars out of the Fly, and to take six men and go on board the black snake, I cut the painter

and shoved the black snake off, I then went on board the fly ; the Lieutenant sent four men on shore and ordered them to go down the river ; when we came to the opening just below Joy's, we could see our men, the smugglers were with them, they threatened the Lieutenant to kill him, he said " don't kill my men, if you want to kill, kill me, I am a mark for you," we rowed down 60 or 80 rods and then took in our four men, the Lieutenant agreed to put Mr. Rice across the river, when we were near the north shore, a gun was fired, then some more at the snake and some at the fly, the third or fourth firing killed Drake ; when they fired, I took up my gun to fire but I could see no one to fire at ; we were ordered to the south shore, but the stream carried us down, there were but two oars on board the fly, and Benjamin Johnson's oar was struck by a ball and went overboard, and we having but one oar the Lieutenant took it & rowed the boat, some times on one side and sometimes on the other ; there were several guns fired while we were crossing the river ; I should think but I am not positive that we were 30 rods further down the river than where Drake was killed ; we were carried down by the stream and we went a little further to get a good landing ; as soon as we landed I and several others ran up the bank into the road and waited until the Lieutenant came up ; Day and Capt Ormsby came to us, Day said " I am innocent, I have not fired a gun," Ormsby said those who had fired at us were in the bushes and we had better surround and take them as soon as possible ; when I first saw Day I cocked my gun and snapped it at him, but it did not go off, Captain Ormsby said Day appeared to be a friend, and Day said he was innocent and so I desisted ; I had known that Day had been one of our troops and had joined the smugglers, I recollected what Day had said when he came down the river with Mudget, that if we went up the river we should see something more terrible than the black snake ; the Lieutenant soon

came up and asked for a cartridge to prime his gun, and said " follow me, we will see where they are ;" we proceeded 3 or 4 rods up the river in the road, I was on the left side of the Lieutenant, I then saw Mott come across the road and bring this large gun now in Court,* and lay it on the corner of the fence and fire ; I saw Mudget bring a gun to his face and point it at us, but whether he fired or not I cannot say, as my attention was drawn to the great gun, if he fired it must have been at the same time, I told the Lieutenant they were going to fire ; when the great gun was discharged the Lieutenant turned partly round, I asked him if he was killed ? he said I am wounded ; I saw Marsh fall, he gasped for breath once or twice, but could not speak and instantly died ; I did not see Mott after this, but it appeared to me he retreated in the road up the river, the Lieutenant was shot through the left arm just above the elbow, a buck shot struck his right shoulder and a ball went through the fore part of his hat and wounded him in the forehead ; Marsh had two balls thro' his breast, I unbuttoned his jacket and saw the holes, I saw likewise a buck shot in his shoulder.

Alexander Walker, sworn. I was a soldier under Lieutenant Farrington at the line ; we took the black snake, I was one of the four men he ordered to proceed down the river on the south shore, we walked from where the black snake lay to near half a mile below Joy's ; Mudget, D. Sheffield, Ledgard and one man more, I did not know, walked with us as far as Joy's, when they went before us ; Mudget told us if the Lieutenant proceeded down the river he would take his heart's blood, that he would not hurt the soldiers unless they stood by the

* *The large gun was present in Court ; it was by admeasurement, one inch and one quarter diameter in the bore, the whole length of the piece including the stock, nine feet & four inches, the barrel* 8 *feet* 2 *inches.*

Lieutenant, but if they did, there would be more than three or four gallons of blood spilt, that the soldiers would all be killed, for they had 30 armed men at the mouth of the river ; when we came to the butternutt I saw the prisoner Dean with a gun.

Prisoner's Counsel. Did you see Dean go down to the place where the firing was ?

Witness. He might have gone for what I know, the last I saw of him he was following us with a gun in his hand, but I cannot say that I noticed him afterwards ; we went on board the fly at the same time with Rice, we were crossing to land him when the firing began, we were near the north shore when the first gun was fired and about the time we struck the shore the second gun was fired, Rice landed and pushed the boat off ; the third gun that was fired at the fly, our boat, killed Drake, there were two balls through Drakes head near together ; he died without speaking a word.

Prisoner's Counsel. Before he was shot did he not raise his gun to fire ?

Witness. Yes, but the Lieutenant said don't fire, they are only attempting to scare us.

Prisoner's Counsel. Did not the Lieutenant say you will lose your shot ?

Witness. No, Drake was just seating himself to take the helm when he was killed, just after he was killed a ball struck the oar of one of our soldiers and then we had but one oar left, which the Lieutenant took and rowed the boat ashore ; the Lieutenant said it was of no use for us to be standing up and ordered us to lay down in the bottom of the boat, for he could row and he had rather risk himself than his men ; we landed and went up the bank, at first I did not see any one, but when we had proceeded on the road a little way I saw a man with a small arm pointed toward us, he fired I suppose at the same time with the great gun, but so near I heard but one report ; I thought he pointed at the Lieutenant who was just before me, I stepped a little out of the way,

I saw Marsh fall, he stood not far from the Lieutenant or me, next to the river, a little out of the path ; I was in the range, Marsh being between me and the Lieutenant, when I stepped one side ; I thought the report was very loud, but I did not then know the large gun was fired ; I saw the Lieutenant was wounded in his arm, he took off his hat and the ball fell out of it, I saw the smoak from Mudget's gun when he fired.

Benjamin Johnson, sworn. I was one of Lieutenant Farrington's soldiers ; when we came where the black snake lay, Mudget stood by the side of her and ordered us not to land ; the Lieutenant or Sergeant said we are in a free country and may land where we please ; the Lieutenant and Sergeant stepped on board, I saw the prisoner Dean near where the black snake lay, as we landed to go after the sails, one of the men said to the lieutenant, " you damned red coated rascal, I will have your heart's blood before you go out of the river, you are a man of honor but I will lay your honor low." We took our four men on board with Mr. Rice and crossed the river in the fly ; the first gun that was fired, the ball struck between the boats, the second ball struck between the lieutenant's legs, I think the third shot which was fired at our boat killed Drake, when the lieutenant ordered us to cross to the south shore ; I was one that rowed, as we rowed across quartering down the river, I could see the place where the firing come from, I saw a man come up on the bank and point his gun at us, he seemed not to like the place, he went to another and pointed his gun at us again, he then removed to a third place, pointed his gun at us and fired, the ball split my oar and knocked it overboard, I looked for the man when I came on shore and have no doubt that man at the bar was the man who fired at me ; I landed with the lieutenant ; when the great gun was fired I saw Capt. Ormsby fall, as he lay on the ground he said, " Lord have mercy upon me, I am a dead man!"

Prisoner's Counsel. Are you sure Dean was the man you saw fire at you ?

Witness. Yes, I am positive ; after the affair was over I mentioned to several of the soldiers that I should know the man when I saw him again, and when we went to Joy's to see the prisoners, I pointed to Dean and said that is the man who fired at me.

ALEXANDER WALKER, again called.

State's Attorney. Do you recollect that Johnson mentioned to you that he should know the man who fired at him ?

Witness. I remember that when we went to Joy's house to see the prisoners, soon after they were taken, Johnson said, pointing to Dean, this is the man who shot at me.

Prisoner's Counsel. Do you remember his mentioning it while in the boat ?

Witness. I do not.

Prisoner's Counsel. Did you see any men on the shore while you was in the boat ?

Witness. I do not recollect seeing any, but I was not looking there all the time.

PETER DILS, sworn. I laid out Capt. Ormsby, I washed the corpse and examined the wounds, one ball went into the pit of his stomach but did not come out at his back, the second ball went through his right breast and came out under his shoulder blade, the third struck him in the lower part of his belly and lodged against the skin of his back, the fourth struck him in the upper part of his right thigh and went through his hip bone, another cut the cords of his right arm, and left a black mark on the skin of his side.

ELKINAH PERKINS, sworn. [This witness was one of the crew of the black snake, against whom the Grand Jury found no bill of Indictment.] About an hour before day, Monday morning, 1st August, 1808, Mudget came to my house on Hogg-island about 5 miles this side of Canada line, and ask-

ed my wife for me and invited me to go along with them in the black snake and insisted very hard that I should go ; I went down to the boat at my landing, one said get in, it is time to be off, Mudget, Mott, Pease, Slocum Clark, William Nokes & the prisoner were in the boat, they had two gallons of rum with them, we rowed on to Martin's bay on the North Hero and stopped at Peter Martin's house, this was about sunrise, we staid there until sometime in the afternoon, we then started on towards Richard Mott's, Mott then spoke of getting the blunderbuss, he said he meant to have it placed on the bow of the boat and he would give them one rake if they attacked him ; in the evening we came to Richard Mott's on the sand bar, Mudget and Mott went in to get the large gun, Mott brought it out and said he had bought it and gave fifteen or sixteen dollars for it, he then laid it on the bow of the boat ; we arrived in onion river about sun rise, Tuesday morning a Frenchman sold us some fish ; we had besides the great gun, nine small ones, one without a lock ; we got up to Joy's a little before noon ; Mudget ordered us to take the guns to the house and discharge them, we fired into a stump to save the balls, a mark was made on the stump and we fired at it from about eight rods distance ; David Sheffield was the only one who hit the mark ; Mudget ordered us all to clean the guns, oil the locks and such as wanted new flints to put them in ; we eat our fish, Mudget said he would go and get provisions and see about getting a load for the boat, which I understood to be pot ash by the talk ; Mudget went and no one was left in the house but me and Nokes, when he came back he brought provisions and showed me some powder, about a pound in a paper, and some lead, about three pounds, which appeared to be part of a still worm, and about a pound and an half of pewter, it was a flat piece of pewter about half an inch in thickness, we cut slugs out of the pewter, we tried to hammer them round-

but the pewter was so brittle that we could not; Nokes loaded the guns and he and Mudget loaded the large gun, they put as much powder into it as I could hold in my hand twice; news was brought that the revenue cutter was coming, this was after sun down, Tuesday evening, but before dark; soon after dark, two gentlemen come down to us and told us they could not load the boat as the revenue boat was coming to take her; we showed them the great gun, and one of them said he would give us ten gallons of rum if we would go down the river and destroy her, I said I did not think it right to murder folks and so said Day, the man did not reply, but took Mudget on one side and talked with him alone and then went off, the company immediately inquired after a bullet mould, I think Mudget and Nokes went after it; after dark Hall's batteau arrived with him and two men, one was Cleveland who used to be a soldier at the lines, the other I did not know; Hall went to Pearl's barn with us to go to sleep, Mott and Day were asleep on the floor, the great gun was in the barn; on Wednesday morning I went with Mott into the house and he asked me to eat, I asked if they had any bitters, Nokes said "here is a thousand," and he told me he had been up all night running balls, he had some in his pocket; Magery Joy took up his spider and said you ought to have cleaned it, Nokes went and cleaned the dross out; Ledgard joined us in the morning, he said he had come up the river in a skiff before day and had, as he said, been to Burlington to pay some money; he told Mudget the revenue boat was coming up the river and that he had better take care of his boat; the word then was, "take arms," but who gave it I cannot say, we all went and carried the guns with us to the butternut trees, large gun and all; it was proposed that Mott and David Sheffield should go and see where the revenue boat was, they went over to the north side of the river and were gone two hours, David Sheffield returned and his brother George brought

him over from the north side of the river in a canoe, soon after Mott came up on the north side, I went and fetched him over in Hall's batteau and he said the revenue boat was close at hand, then Mudget, Nokes and Clark went to spy down the south side and returned and said they were very near, Day and others then went and the arms were then all carried to where the snake lay; the prisoner Dean carried the big gun and I gave Mott the ramrod over the fence, I went up to where the black snake lay and got behind a stump; the revenue boat came up and said they must have the boat, Ledgard challenged the lieutenant out to fight, what the lieutenant said I could not hear as he spoke lower, but I heard Ledgard say "I will have your heart's blood before you leave the river;" the snake's men went down the river after she was taken, I was by Joy's house when I heard the first gun fired and I ran down the river, I met David Sheffield in the road opposite where Drake was killed, he told me I was a coward, I saw him then rise the bank and draw his gun up and take as deliberate aim as if he was going to fire at a duck, he fired, and then said "I took good aim," and then went down the river, there were then three or four guns fired and then the big gun was fired; before the big gun was fired, Mudget run up and said for God's sake fire no more, there are men or a man killed, I thought he said men, he then went towards where the boats landed, he had no gun in his hands, I don't think Mudget had time to go back to where the great gun was before it was fired.

Court. Where abouts were the boats at the time Mudget left you to go towards the place where the great gun was fired?

Witness. The boats were then in the river, they had not landed, I was about ten rods above where the great gun was fired, I met Mott with the big gun on his shoulder, I said, "Mott have you fired that gun?" he said "yes," I said, "you are not going to fire it again," he replied, "yes, I would if

I had the ramrod but I left it where the snake lay," then he threw the gun off from his shoulder and went towards Joy's ; I met captain Pease half way between where I parted with Mott and Joy's, he told me he had not been down where the firing was ; some time before the firing, Day and I conversed together and we said, " if we fire at and kill any of these men it will be murder," and so said Pease, he said it would be murder ; when we were under the butternut trees we all had our guns, but Day and I took our guns and walked down the river and then this conversation happened, and we left our guns leaning against some trees and returned to the butternuts without them ; Nokes said where are your guns, you are traitors, we then went after our guns and set them with the rest against the butternut trees and we never took them afterwards.

Prisoner's Counsel. Was you ever told it was right to run property ? *Witness.* No.

Prisoner's Counsel. Was you ever offered any reward ? *Witness.* Never particularly by any one but Mudget, except what I have told.

Prisoner's Counsel. How far was you from David Sheffield when he fired ? *Witness.* I should say about three rods, but I could see a man there near twenty rods.

State's Attorney. Did the prisoner own any part of the black snake ? *Witness.* I never understood he did, it was said among us that Mudget owned the boat, that he purchased her of the Taylors for $ 200, and that Mott was to own half of her after this trip.

The Court adjourned until Monday morning, 8 o'clock. The Prisoner was remanded and the Jury were committed to the care of an officer to be kept together.

Monday morning, Sept. 5.

Present the whole Court.

The Prisoner was put to the bar and the trial proceeded.

The Prisoner's Counsel now called Witnesses in his defence.

NATHAN B. HASWELL, sworn. I heard one of the soldiers of the revenue boat say they were to have a bounty of one hundred dollars. I am Deputy Collector. Johnson the sergeant applied to me for a certificate or receipt for the black snake, to get the bounty.

Prisoner's Counsel. We wish to show by this witness that the prisoner, relying upon his innocence, did not attempt to escape after the affray.

Court. Proceed in your defence.

Prisoner's Counsel, (to the witness.) Was you present when the prisoner was apprehended? Did he attempt to escape? Was he not assisting the wounded?

Witness. I assisted in apprehending the prisoner who was then within 10, 15 or 20 rods of where Marsh and Ormsby lay, I asked him how he came there, he said "upon his feet," and asked what authority I had to apprehend him, I saw him struggle with Rice; the prisoner was then in the edge of the bushes.

DAVID RUSSELL, Esq. sworn. I told the sergeant in a jesting way that as he had sworn the revenue boat struck her colours, for he did so at the court of examination, though he has since said he was mistaken, they were not entitled to the bounty; he replied we kept the boat and are to have the bounty; he did not tell me from whom he expected it, but said they were to have one hundred dollars extra.

ALEXANDER WALKER, called again by the prisoner's counsel.

Have you not been this morning to the intervale? relate what took place there.

Witness. I have been this morning to examine the ground more particularly, I find it was about a quarter of a mile from the upper end of the woods to where the big gun was fired; Mr. Lathrop paced

the ground from where he stood to where the great gun was fired and found it to be *six* instead of *three* rods, but it was in plain sight.

Prisoner's Counsel. How far off were the men who fired at Drake from him when he was killed ?

Witness. It could not be more than 8 rods.

Prisoner's Counsel. How far was Dean fromMott?

Witness. I cannot tell.

Prisoner's Counsel. Did I understand you to say that when you went from Joy's to where you got on board the boat, you left Dean behind you ?

Witness. I said I did not see Dean all the whole way down to where we went on board, but the last I saw of him he was running down with his gun in his hand, he might have kept down all the way and I not notice him.

Stephen Pearl Lathrop, called again by the Prisoner's Counsel. I went this morning with Mr. Turner, the prisoner's Counsel and at his request to view the ground where the affair happened ; I found the corner of the fence upon which Mott rested the large gun when he fired, and the place where I suppose I stood ; I have paced and find it to be near six, instead of three rods from Mott, but I was in plain sight of him ; the prisoner stood partly in the trench about three rods from me quartering, so that he was about one rod further from Mott than I was when he hollowed to him to fire.

Prisoner's Counsel. What cloaths had the prisoner Dean on ?

Witness. I think he had a dark short coat on, I think it is the same he has now on in Court.

Prisoner's Counsel. Had Dean a gun ?

Witness. I cannot be positive whether he had or not.

Prisoner's Counsel. Was Dean in full view ?

Witness. I turned my head a little when he hollowed and saw him plainly, and I have no doubt Mott heard him as he laid the gun immediately on the fence and fired.

Question by a Juryman. Are you positive it was the prisoner Dean who told Mott to fire ?

Witness. I should not have sworn it was he unless I had been positive.

State's Attorney. When you saw the black snake's crew with their muskets under the butternut trees, were they loaded ?

Witness. They told me they were all loaded.

CHARLES ADAMS, called and sworn.

Prisoner's Counsel. We introduce this witness to impeach the testimony of Stephen Pearl Lathrop ; we shall show that before the Court of examination, Lathrop swore very differently as to the distances he stood from Mott and Dean.

Court. Lathrop has testified on this very trial that he stood about three rods from Mott when he discharged the large gun, but he has this morning been to inspect the spot and rectified his testimony by actual admeasurement ; it turns out in evidence that he went to inspect the spot, by the procurement and in company with the prisoner's Counsel, and is now produced to testify in the defence. The Court doubt the propriety of any attempt to impeach his testimony in this particular, by shewing that he swore differently before the Court of Inquiry.

Charles Adams was not examined.

The State's Attorney now called witnesses on the part of the State.

ASA RICE, sworn.

State's Attorney. Did you assist in apprehending Dean ? give the Court and Jury an account of his behaviour.

Witness. I assisted in taking Dean, he was standing by the dead bodies, Mr. Haswell said take him, Dean wanted to know by what authority I went to lay hands on him, he closed with me, took the lock of me and threw me down, but he soon after said he would go with others ; he was led off to Joy's ; when we came there he was tied but he contrived to get loose, jumped out of the window and ran to-

wards the woods, I was one of those who ran after him, when I came up with him he kicked me, we brought him back.

James White, Jun. sworn. I was present when the great gun was fired, after they had fired, I saw them take off their hats and huzza ; at the same time the great gun was fired I saw a man stand on the edge of the bushes, he presented his gun at us and fired ; I was one of the soldiers ; this man had a white hat on, I saw him afterwards and know it was Mudget.

Lieutenant Farrington, sworn. I was an officer in the militia of this state, detached to keep guard on Windmill Point. News came to the Point that the black snake, a boat which had frequently gone into Canada with pot ashes, had passed up the lake and we understood that she was not sufficiently armed and therefore it was concluded she might be taken and no lives lost ; I was commanded to detach a sergeant and twelve men and go after her in the revenue boat and take her. My orders were when I came within reach of her to hoist my flag, then to fire before her bow, then behind her stern and if she did not surrender, to level at her. We proceeded up the lake as the other witnesses have related ; as we entered Onion river, after seeing the boy in the canoe, we saw the man who inquired for Dr. Wood, some of my men entered into conversation with him, but I told them not to mind him ; we come to Hall's batteau, I confirm sergeant Johnson's testimony as to the conversation with Day ; we rowed up to where the black snake lay, there was a man stood by her with a gun, who threatened to shoot the first man who came on board, I stepped on board with the sergeant and took the boat ; there was much threatening language as has been testified by other witnesses, and a number of men appeared armed to oppose us, but I thought it most prudent to take the boat without regarding them, or at least to wait until they fired first ; after I had got posses-

sion of the boat, I at first thought it my duty to go on shore and apprehend the men who were in arms, but I was determined from the first setting out, to shed no blood if it could possibly be avoided and so I desisted. I ordered my men to go and search for the oars and sails, one sail I believe only was found and brought on board the black snake, she was then unloosed from the shore and I ordered sergeant Johnson and six men with six oars from the fly to go on board; I ordered four men to go on the south shore as a flanking party and went on board the fly myself with two men and two oars and we proceeded down the river, when we came opposite Joy's landing, we could see our men and some of the black snake's crew, who used much threatening and abusive language; after we had rowed down about a quarter of a mile, I took the four men on board with Mr. Rice, who I engaged to carry across the river; as we came near the north shore the first gun was fired; the ball struck between the boats; about this time some one of my men raised his gun, I ordered him not to fire, as I supposed they only attempted to terrify us; a ball from the second gun came through the stern of the fly and within a few inches of my legs; I then found they were in earnest and resolved to go to the south shore; we landed Rice and pushed off the fly; I ordered Ellis Drake to take the helm and steer for the south shore, when we were a little distance from the shore and several balls had been fired at the snake, the gun was fired which killed Drake; as we were crossing the river to gain the south shore, a ball struck the oar held by Benjamin Johnson and it went overboard; as the firing did not cease, I ordered my men to lay down in the bottom of the boat, whilst I rowed with one oar; when we arrived on shore, I can only relate as the other witnesses have done; we went up the bank, marched a few rods in the road and the large gun was fired, which killed Capt. Ormsby and Asa Marsh. The Flag came down immediately upon

Ellis Drake's being killed, whether by his falling against it, or some other way, I cannot tell, but I did not strike it or order it to be struck.

State's Attorney. Were you or your men to have any reward or bounty for taking the black snake ?

Witness. I never heard of any bounty offered by Dr. Penniman or Capt. Pratt, but I believe there was some talk among the soldiers, some said 25, some 50, and some 100 dollars.

State's Attorney. Did Benjamin Johnson ever mention to you that he saw the man who fired at him ?

Witness. When I lay sick in Burlington, I heard that some of my men saw a man who fired at the boat; on my return to my company, about three weeks after the affair, Benjamin Johnson told me that he saw a man present a gun at him three times, the last time he fired and hit his oar ; that when he came on shore, he picked out the man, and his name was Dean, who I understand is the man now on trial.

Here the evidence closed.

Bates Turner, Esq. opened and Amos Marsh, Esq. closed the Prisoner's Defence ; and C. P. Vanness, Esq. closed for the state.

After the Judges had severally charged, the Jury were committed to the charge of an officer, sworn according to the statute ; and the Court had a recess. About two o'clock, Tuesday morning, the Jury returned into Court and were called and numbered.

Clerk. Gentlemen of the Jury, are you agreed in your verdict ? *Jury.* Agreed.

Clerk. Who shall say for you ?

Jury. Our Foreman.

Clerk. Who is your Foreman ?

Jury. John Brown.

Clerk. Mr. Foreman, look upon the Prisoner at the bar. Cyrus B. Dean, look at the Foreman of the Jury. How say you, Mr. Foreman, is the Prisoner at the bar, guilty of the charges in the Indictment, or not guilty. *Foreman.* GUILTY.

The Prisoner was remanded, and the Court adjourned over the Freeman's meeting, until Wednesday morning, 7th September.

Wednesday and Thursday, the Court were occupied with the trial of David Sheffield; on Friday morning, the Jury returned their verdict; Friday afternoon, the motion for a new trial in the case of the State versus Samuel I. Mott, was argued. On Saturday morning, Cyrus B. Dean filed the following motion in arrest of Judgment.

SUPREME COURT, *August* 1808. } SPECIAL SESSION.

STATE OF VERMONT,
vs.
CYRUS B. DEAN.

NOW the said Cyrus B. Dean, after Verdict and before Judgment, prays the Court, that no Judgment may be rendered on said verdict, and that the same may be set aside, and for cause assigns:

1st. That the Indictment on which said verdict was founded, is wholly insufficient in law, for this Court to render Judgment thereon.

2d. That the Grand Jurors who found the bill of Indictment, on which said verdict is returned, appear, from the venire issued for that purpose, to have been summoned by Daniel Staniford, Sheriff of the county of Chittenden, whereas the truth is, they or either of them were not drawn or summoned by said Staniford, but by Ephraim Hurlbut or some other person, who was not legally authorized to draw said Jurors, nor to serve or return said venire; and so the said Cyrus B. Dean says, the Grand Jurors were not drawn and summoned according to the laws of this State.

3d. That the said Grand Jury were not drawn from the Jury box, in the presence of the town Clerks, nor in the presence of any selectman or selectmen of the respective towns.

4th. That the Sheriff whose duty it was, to have summoned the Grand Jury, was determined to procure the said Cyrus B. Dean to be convicted; and for that purpose was guilty of partiality in drawing and summoning and procuring to be drawn and summoned, the Jurors aforesaid.

5th. That one of the Grand Jurors was an alien, not a freeholder, but a subject of his Britannic Majesty and was never made a citizen of the United States by naturalization.

6th. That the Jurors of the said Grand Jury did not understand the charge delivered to them, in this, to wit, that they supposed that they were directed to find all who were any way instrumental in the death of any person, Guilty of Murder, and leave it to the Petit Jury to find them guilty of Manslaughter only.

7th. That one of the Grand Jurors had made up and expressed his opinion before he was impannelled, and this was unknown to the Prisoner and his Counsel until after the conviction of said Prisoner.

CYRUS B. DEAN,
by his Attorney, AMOS MARSH.

The motion was argued by Messrs. Edmonds and Marsh for the prisoner, and Col. Fay for the state.

Friday afternoon, the Court gave the following opinion, upon the motion in arrest.

THE Court have taken into consideration the motion filed in this cause in arrest of Judgment, and are now prepared to render their opinion upon the several exceptions to the process.

The first exception was waved by the Prisoner's Counsel; in support of the fourth, sixth and seventh, no evidenae is before the Court; the second, third and fifth remain for the decision of the Court.

In support of the second, the following facts appear in evidence; that the Clerk issued a proper venire, directed to the Sheriff of the county or his deputy, dated the 15th day of August, A. D. 1808, commanding him to summon 18 judicious freeholders, from 18 several towns in the county of Chitten-

den, to appear and serve as Grand Jurors before the special session of the Supreme Court of Judicature, to be holden in Burlington, on the 23d day of August, A. D. 1808; the Sheriff has returned on this venire, that he has summoned the array; that the Sheriff copied this venire, and part of the array were summoned under this copy, which copy is returned into Court and there appears indorsed on the same---

Burlington, August 17*th*, 1808.

I hereby authorize Ephraim Hurlbut to serve and return this venire as the law directs.

Attest, DANIEL STANIFORD, *Sheriff.*

Colchester, August 17*th*, 1808.

Then served this venire, by drawing and summoning Roger Enos, Jun. to serve as a Grand Juror, as the law directs.

Attest, EPHRAIM HURLBUT,
specially authorized.

Chittenden County, ss.

Ephraim Hurlbut personally appeared and made solemn oath, that the return by him hereon indorsed is according to truth, before me,

MOSES FAY, *Justice Peace.*

HEMAN ALLEN, Esq. Town Clerk of Colchester, testifies---" That Ephraim Hurlbut, on the day mentioned in his return of service, came to my office in Colchester, and drew Roger Enos, Jun. Esq. as a Grand Juror, fairly and in my presence; the Sheriff informed me some days previous that he should deputize him."

EPHRAIM HURLBUT, *(examined on motion of the Prisoner's Counsel and by concession of the State's Attorney,)* testifies---" On the 16th of August last, Sheriff Staniford requested me to assist in the service of the venire, as he observed the time allowed for service was so short and he and his deputies so much engaged; that he deemed it necessary to call in assistance; he copied the original venire in my presence and entered the special deputation on the back of the copy; I served it in the town of Col-

chester ; drew the Grand Juryman fairly and in presence of the town Clerk, and indorsed my return, to which I have this day made oath ; I have heretofore served as a deputy Sheriff and supposed this was a proper way of doing the business.

Two exceptions are here taken to the formality of this process.

First, that the Sheriff had no legal authority to deputize, upon a copy of the original venire ; *Second*, that if the Sheriff had such authority, the deputation must have been recorded in the county Clerk's office, before the deputy could be legally empowered to act under it.

As to the first of these exceptions, the 59th section of the act "constituting the Supreme court of Judicature, &c." provides, " that it shall be the duty of the Clerk of the Supreme Court of Judicature in each county, some time previous to the stated session of said Court, (and a subsequent section extends it to a special session,) to issue a venire, directed to the sheriff of the county or his deputy, and deliver or cause the same to be delivered to such sheriff, commanding *him* to summon eighteen judicious men being freeholders within said county, to appear before said Court, at 10 o'clock, on the first day of the sessions of said Court, to serve as Grand Jurors in said Court."

The statute directs, and the uniform practice has been, for the clerk to issue one writ of venire, upon which, so far as the Court are advised, the sheriff generally makes a return that the service required has been done, and in his account for the service, always charges it as done by himself, although it may have been partially executed by his deputy ordinarily or specially deputized ; as the law provides that eighteen Grand Jurors shall be summoned, and generally as in the present case, from the same number of towns, it would be often difficult, and in case of a venire returnable to a special sesson of the Court, when the time of service is necessarily abridged, im-

practicable, for the original venire to be sent to all those towns, within the time designated for the service; in such cases, an attested copy has been delivered by the sheriff to his deputy, and the service under such copy comprehended in the general return of service by the sheriff, on the original venire; but if this mode should be thought not sufficiently correct, the Court consider that the informality of such process, can only be brought into question in justification for the non appearance of a Grand Juror, in disobedience to such summons; but upon the Jurors appearance can be taken no advantage of by the prisoner, to vitiate the array in arrest of judgment.

As to the second exception, that the deputation should have been recorded before the deputy could act, the court have deliberately perused the statute, "regulating the office and duty of Sheriffs, High Bailiffs, &c. the 2d section of which act, defines the Sheriff's power generally, then empowers him to appoint such number of deputies as the judges of the County Court in such county, shall from time to time limit and direct, which deputies shall have power to serve all processes, and to do all acts, generally, which the Sheriff is empowered or required by law to do and perform, and all acts, doings and returns of such deputies, shall be signed by them respectively, as deputy sheriffs, and shall be taken and deemed as the act of the Sheriff appointing them; the statute then makes the sheriff responsible for the conduct of his deputies, provides for his taking bonds of indemnification, and then enacts that every deputy sheriff shall before he proceed in the execution of his office, cause his deputation and oath of office certified thereon, to be recorded in the county clerk's office in the same county, and if the Sheriff shall before such deputation expire, dismiss such deputy, or revoke such deputation, such revocation shall be recorded in the county Clerk's office, and all the acts and doings of any such deputy Sheriff, before his deputation and oath of office shall be recorded as aforesaid, shall be null and void in law."

The 3d section provides that the Sheriffs in their respective counties, shall have power on special occasions, at the risk of the Plaintiff, to depute any meet person to serve any particular writ or process, which deputation shall be entered on the back of such writ or process, and shall have power to depute some meet person to serve warrants in criminal cases, *as also other precepts*, when either the interest of the community or the exigency of the cases may require it, any thing in this act to the contrary notwithstanding: Provided always, that when any person shall be deputed to serve a writ or process on any special occasion as aforesaid, and shall make oath before some justice of the peace, or in open court, that he truly and faithfully served the same agreeably to his indorsement thereon, and that he did not fill up, make or alter said writ or process, and such oath being certified thereon by the authority administering the same, such process shall be good and valid in law. It is manifest the Legislature by this act, contemplated two kinds of deputation by the Sheriff, the one empowering him to appoint his ordinary or stated deputies, the other to depute especial deputies, either in civil or criminal process, or on those occasions where the interest of the community or the exigencies of the cases may require it. In the appointment of the ordinary and stated deputies, they provided that they should have the same general power as the Sheriff within his bailiwick, they imposed an oath upon them and directed that a certificate of such oath, with their deputation, and in case it might happen, the revocation of the same, should be recorded in the county Clerk's office. There is the utmost propriety in these provisions of the statute, the Sheriff has great power within his county, and it is necessary that the people should know who sustain this high office; he is to see that the laws are put in execution and preserve the public peace; in civil process he is not obliged to shew his precept, or in criminal, his warrant; he has power to suppress with force and strong

hand, when the necessity of the case shall require it, all tumults, riots, routs & other unlawful assemblies, & to apprehend without warrant, all such persons as he may find so assembled in disturbance of the peace; he may call all persons present to his aid, who are bound to obey him under a penalty; should he kill any person in suppressing any opposition, he will be holden guiltless; this is but a portion of the extensive power committed to the Sheriff. Is there not then the greatest propriety, that when he shall designate those persons who by law are to be coequal with him in this high authority, that such should have their names inscribed on the public records for the information of the people ?

But do any of these reasons apply for the recording of the names of persons especially deputized ? Under the third section of the act, are they by such deputations invested with the general powers of the Sheriff ? Is it requisite that their persons should be generally known ? If they should kill when opposed in the service of civil or criminal process, or other duty especially assigned them, can they justify without having produced their precept ? Does the public convenience or good require that their deputations should be recorded ? The Legislature have considered them as persons deputed on occasions when the interest of the community or the exigencies of the case require it, and have therefore imposed no official oath, but considered that when they had done any duty to which they may have been especially deputized, their personal oath to the faithful discharge of the particular duty should be sufficient; when a person thus especially deputized has perfected the service assigned him, he is *functus officii;* he comes into office upon emergency, to do a particular duty, when he has done it, his office ceases; hence the Legislature have not provided that his appointment or the revocation of it should be recorded, but enacted that the particular service done by him, under an especial deputation, with his return thereon, sub-

stantiated by his oath, "*should be good and valid in law.*" The court therefore consider, that the service of the venire in Colchester, by Ephraim Hurlbut, under the special deputation of the Sheriff, is good and valid in law.

The Court have considered, also, the third exception in arrest---that the said Grand Jury were not drawn from the Jury box in the presence of the town Clerks, nor in the presence of any Selectman or Selectmen of the respective towns.

It will be recollected, that when Seeley Bennet, a legal deputy Sheriff, who summoned the Grand Juror from Williston, was adduced as a witness, the Court intimated that by former decisions, they would not compel an officer to impeach his return, under his official oath on the record, but by consent, the officer was admitted to testify. He testified, that as deputy Sheriff, he went with the venire to the office of the town Clerk of Williston, that the clerk was absent, that he found two names written on a piece of paper, partly separated, and a certificate attested by the town Clerk, that these were the names of all the persons who had been nominated by the authority of the town as Grand Jurors, whose names had not been drawn from the box ; that in the presence of the town Clerk's wife, he separated these two written names and put them into the box, covered it with his handkerchief and drew from thence the name of Truman Chittenden, Esq. who he summoned to serve on the Grand Jury ; that he made the draft fairly and as he supposed legally, it having been practised on former occasions.

It will also be recollected that early in the session, this point was moved in demurer ; the Court suggested that they wished to hear argument, that a decision might be made in time to impannel another Jury, if the array of the present should upon investigation be found insufficient ; the Court then decided that the exception in demurer could not prevail. Since the argument on the present motion, they

have again given all due attention to the subject, and are confirmed in their earlier opinion. The Statute cited, is that constituting a Supreme Court of Judicature, &c. The 58th section enacts, that such Sheriff or his deputy shall repair to the town Clerk's office in every such town, and in his presence, or in case he shall be absent, *in the presence of one or more of the Selectmen of such town*, draw out of the box the names of the persons nominated by the authority of such town to serve as Petit Jurors, the number his venire directs him to summon, and shall summon the persons so drawn, by reading the said venire in their hearing and notifying them respectively to serve as Jurors, agreeably to the precept of said venire, with such notice indorsed thereon as is directed in the service of summons in civil process; but if any such person shall be absent or sick, so that probably they cannot attend such Court, the name or names of such person or persons shall be returned into the box and others drawn in their stead and summoned as aforesaid, which venire the said Sheriff or his deputy shall return, with the names of the persons so summoned indorsed thereon, to the Clerk issuing the same, on the second day of the sessions of said Court. Section 59th directs that Grand Jurors shall be drawn, &c. in the same manner.

The Court consider the object of the Statute is, to have Jurors drawn impartially, that to this intent the act provides that the Sheriff shall make the draft in presence of some other person, but when it is made to appear to the Court by the party's own shewing, that the object of the Statute provision has been effected, and the Juror fairly and impartially drawn, the non-compliance of the officer with the Statute requisition in this particular, can only be considered under a rule for the amercement of the officer for neglect of duty.

Upon a general view of our statutes, it is observeable, that where the Legislature have pointed ou

certain requisites in the doing of any duty or perfecting any process, when they intend that the neglect of such requisites shall vitiate the process, they never fail to declare that in such case, such process shall be null and void, and therefore it has been uniformly decided by the Court, that where a Statute directed any requisite in process, and had not expressly declared that the non-performance of such requisite should render the process void, that it is merely voidable and never to quash such process, when it appeared in evidence that the main intent of the statute had been fairly effected ; thus a multiplicity of acts for the levying and collecting of taxes, direct in express terms that the Collectors should be sworn to the faithful discharge of their duty ; when the construction of those acts came under the consideration of the Court, they have uniformly considered that where it was made to appear that the officer had done his duty, according to the intent of any such statute, without the obligation of an oath, his doings under the act should not on that account be impeached, provided such act contained no clause declaring that in such case the proceedings under the act should be absolutely void ; and it would seem reasonable, that where the Legislature had imposed a duty and directed it to be done in the presence of another, who might report to the Courts of Law whether it was performed faithfully or not, that if plenary proof appears that such duty has been faithfully done, the main object of the Legislature will have been attained. But if the Court are incorrect in this, they are decidedly of opinion, that this misconduct of the officer cannot avail to vitiate the array of the Grand Jury who found this bill of Indictment.

The fifth exception---That one of the Grand Jurors was an alien and not a freeholder, &c. presents a question of primary magnitude and importance for the decision of the Court, both as it relates to the prisoner and numbers of the inhabitants of the State. The facts as conceded, are, that John Tharp, one of

the pannel of Grand Jurors, is a natural born subject of his Britannic Majesty, that he has resided in this State for more than seven years last past, that he come into the United States some time before, how long does not appear, that he has a wife, family and home in the town of Charlotte in this county, and nearly the whole of the above term he has been in actual possession of, and held an apparently good record title, purporting to be in fee, to a large landed estate in that town, that he has taken the Freeman's oath and has been admitted to vote in the town and state elections, but that he has never been naturalized under the existing laws of the United States. The question is, whether John Tharp, thus circumstanced, is included within that statute description---A JUDICIOUS FREEHOLDER---which qualifies him to serve on the Grand Jury impannelled before this Court. The 22d section of our State Constitution, declares, "That every man of the full age of twenty one years, having resided within this state for the space of one whole year, next before the election of Representatives, and is of a quiet and peaceable behavior and will take the following oath, shall be entitled to all the privileges of a freeman of this State;" then follows the freeman's oath. Although by a restricted construction of this article, the expression---"*all the privileges*," might seem merely to comprehend those which relate to the right of voting for Representatives, yet that no doubt might remain as to the right of those who come to settle in this State, to invest themselves with title to the soil, the 39th section of the Constitution declares, "that every person of a good character who comes to settle in this state, having first taken an oath or affirmation to the same, may purchase or by other just means acquire, hold and transfer land or other real estate, and after one year's residence shall be deemed a free denizen thereof and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected Governor, Lieutenant Gover-

nor, Treasurer, Councillor or Representative in Assembly, until after two years residence.

It appears by this article, that John Tharp may constitutionally hold land to any extent in fee simple, that at the time he was summoned as Grand Juror, he was eligible to be elected as Governor, Lieutenant Governor, Treasurer, or to a seat in either house of the General Assembly, and that six years since he might constitutionally have held the office of a Judge on this bench ; but it is contended that he cannot be a Juror, for that he is an alien, and as such, cannot invest himself with title to the freehold ; that the constitution of the United States declares that Congress shall have power to establish an uniform rule of naturalization throughout the United States, that there is an existing law to that purpose, that the Constitution of the United States being the supreme law has abrogated our state Constitution. Section 8th, of the United States' Constitution vests Congress with the power to establish an uniform rule of naturalization and uniform laws on the subject of Bankruptcies, throughout the United States. It appears that Congress have passed several laws on this subject. January 29th, 1795, they passed an act to establish an uniform rule of naturalization throughout the United States, and by this act, repealed a former act, passed March 26th, 1790; to that of January 1795, they added a supplementary act, June 18th, 1798, by which they enacted, "that no alien shall be admitted to become a citizen of the United States or of any State, unless in the manner prescribed by the act, passed in 1795," and then altered the term required for residence previous to the admission to become naturalized.

The Court are inclined to consider the Constitution and laws of the United States, as not in the least interfering with the Constitution and laws of this State, in the point under consideration ; that the object of naturalization as contemplated by the framers of the Constitution of the United States, and these

acts of Congress, is merely national, to be brought into view under questions of qualification for office under the United States' Government, or of individuals claiming national benefits. To give them any other construction, would be to infringe the State sovereignty over lands confessedly within its jurisdiction. We learn from the eleventh and twelfth articles of the first amendment to the Constitution of the United States, " that the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people ; that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." If then, Congress have power to intermeddle with the soil within a State's jurisdiction ---to say who should, or rather who should not hold or possess it, this power must have been expressly delegated to the government of the United States. When we look for this delegation in the Constitution of the United States, we read, " that Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district, (not exceeding ten miles square,) as may by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by consent of the Legislatures, in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings."

Further, the Court suggested that this was a question of magnitude, as involving the interests of many of our citizens ; without being more particular, we mention the inhabitants of the town of Ryegate, which was principally owned by a company of adventurers in Scotland who are yet in existance, and who from time to time portion out their lands and send orders to their agents in Ryegate, to put certain of the adventurers in possession, on their arrival.--- This town has been principally settled in this mode,

and its inhabitants are now numerous, such have done, and are continually doing service as jurors, without any exception to them, and yet there is not one person amongst them naturalized under the acts of Congress; it is obvious, many other inhabitants of Vermont are in the same predicament; this state is emphatically a land of emigrants, the language of our constitution is inviting to all to come and fertilize our soil, and share with us in the blessings of our government. As the Supreme Court of the land, we cannot abridge the privileges of those who have given credit to the declarations of our State Constitution, until we see some express law of Congress, surely bottomed upon the Constitution of the United States, explicitly abrogating those privileges.--- The Court therefore consider John Tharp to be a judicious freeholder of the State, and as such, qualified to serve on the Grand Jury.

Upon due consideration of the subject matter of the exceptions, it is the opinion of the Court, that the Prisoner take nothing by his motion in arrest of judgment.

Clerk. Cyrus B. Dean, have you ought to say why the Court should not proceed to render the sentence of the law against you?

Prisoner's Counsel. We wish on behalf of the prisoner, that the day of execution may be set some time during the sessions of the General Assembly, as it will save an application to the Governor and Council.

After some preparatory remarks, the Court sentenced the prisoner to be taken to the place of public Execution, on Friday the 28th day October, 1808, then and there, between the hours of 10 o'clock in the forenoon, and three o'clock in the afternoon, TO BE HUNG BY THE NECK UNTIL HE IS DEAD.

FINIS.